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JAMES R. BROWNING, Clerk

# Supreme Court of the United States

**October Term, 1958**

No. 358

DE FONCE CONSTRUCTION COMPANY, INC., J. B. COOPER and MANUFACTURERS CASUALTY INSURANCE COMPANY,

*Petitioners,*

AGAINST

THE CITY OF MIAMI, for the use and benefit of COMPLETE MACHINERY AND EQUIPMENT COMPANY, INC.,

*Respondent.*

## RESPONDENT'S REPLY BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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### Statement

This reply brief is respectfully submitted on behalf of the respondent in order to answer the statements and misstatements made in the reply brief submitted by the petitioners herein. This brief will also discuss the cases relied upon by the petitioners in their reply brief.

It is interesting to note that these same fallacious arguments were raised by the petitioners in their reply brief in the Court of Appeals, and the same were completely and properly rejected by that Court.

Typical of the distortions and bad faith of the petitioners herein is the blatant falsehood contained on page 2 of the petitioners' reply brief. The following statement is there made:

> "At the time of the service of our notice of appeal the respondent had already served its own notice of appeal with respect to our judgment, and we were intending to argue the full case before the Court."

The truth is that the petitioners' notice of appeal herein was served and filed on February 6, 1957 (R. 184) and the notice of appeal on behalf of the respondent was served and filed on February 26, 1957 (R. 186), some twenty days later. Furthermore, the said notice of appeal filed by the respondent was withdrawn and dismissed by stipulation between the parties with the approval of the Trial Court on March 4, 1957 (R. 186). Accordingly, the allegations in the above quotation are thus clearly proved to be false and misleading.

**Discussion of Cases Relied on in Petitioners' Reply Brief**

The instant case is easily distinguishable from *Commercial National Bank in Shreveport* v. *Parsons*, 144 F. 2d 431 (C. A. 5—1944), (cited on page 2 of petitioners' reply brief), in that we are here dealing with two separate and distinct judgments, one of which has been appealed, and the other which is not even before this Court. In *Commercial National Bank in Shreveport* v. *Parsons, supra,* the appeal dealt only with one solitary judgment, which involved an equity action for an accounting under a contract. In fact, on page 240 of that case, the Court was careful to point this fact out, as follows:

> "* * * There was but one final judgment in this case; the others were interlocutory. The appellant saw fit to appeal from the entire judgment, not from items or portions thereof as it might have done. Also, under Rule 75 (d), Rules of Civil Procedure, 28 U. S. C. A. following section 723c, it designated the entire record, proceedings, and evidence in the court below for inclusion in the record of appeal * * *."

It is a well established doctrine that the jurisdiction conferred upon an Appellate Court in hearing appeals from judgments must be invoked before it may be exercised. Obviously, in our case, this Court has no basis or grounds whatsoever for considering the judgment which has not even been appealed. The Appellate Court in *Chlapsa* v. *Posvic*, 113 F. 2d 375 (C. A. 7—1940), stated as follows:

> "That part of the order allowing such fees was not appealed from and we have no right to give consideration thereto."

In *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 435, 44 S. Ct. 560, 564, 68 L. Ed., 1087 (1924), Mr. Justice Brandeis made the following observation:

> "It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below."

An attempt is made on page 3 of the petitioners' reply brief to minimize the authority of the rule of law enunciated by the Court of Appeals, Fifth Circuit, in *Arkansas Fuel Oil Co. v. Leish*, 133 F. 2d 79 (C. A. 5—1943). The fact is that the rule in the *Arkansas Fuel Oil* case is still the accepted one in the Fifth Circuit, and has been cited with approval as late as October, 1957, in *Able v. Brayton Flying Service*, 248 F. 2d 713 (C. A. 5—1957).

The case of *Long v. Union Pac. R. Co.*, 206 F. 2d 829, 830 (C. A. 10—1953) (cited on page 3 of petitioners' reply brief), in fact, dismissed the appeal and carefully analyzed the requirements of a notice of appeal in a *Per Curiam* opinion, which reads in part as follows:

> "Rule 73(b) of the Rules of Civil Procedure, 28 U. S. C. A., provides that the notice of appeal, shall, among other things, 'designate the judgment or part thereof appealed from.' This is a mandatory requirement and the jurisdiction of this court is limited to the judgment or portion thereof designated. Ford Motor Co. v. Busam Motor Sales, Inc., 6 Cir., 185 F. 2d 531; French v. Jeffries, 7 Cir., 161 F. 2d 97; Carter v. Powell, 5 Cir., 194 F. 2d 428, certiorari denied 308 U. S. 611, 60 S. Ct. 173, 84 L. Ed. 511. The rule is designed to provide a simple and efficient method for taking an appeal and courts should be liberal in construing the sufficiency of the notice. Fahs v. Merrill, 5 Cir., 142 F. 2d 658, affirmed 324 U. S. 308, 65 S. Ct. 655, 89 L. Ed. 963; Martin v. Clarke, 7 Cir., 105 F. 2d 663, 124 A. L. R. 1 [illegible] cannot however, disregard the plain requirements of the rule and read into the notice something that isn't there."

The other cases relied on and cited on pages 3 and 4 of the petitioners' reply brief, namely *Martin* v. *Clarke*, 105 F. 2d 685 (C. A. 7—1939), and *Sun-Lite Awning Corp.* v. *E. J. Conklin Aviation Corp.*, 176 F. 2d 344 (C. A. 4—1949), are in no way applicable to the issues involved in the instant appeal.

The applicable rule regarding the necessity of filing a proper notice of appeal in order to invoke jurisdiction of this Court was well stated by Mr. Justice Holmes, speaking for a unanimous Court, in *Landram* v. *Jordan*, 203 U. S. 56, 62, 27 S. Ct. 17, 18, 51 L. Ed. 88, 90 (1906):

> "* * * according to the rule that has been laid down in this court, Gabriella, as she did not appeal cannot go beyond supporting the decree and opposing every assignment of error. Mount Pleasant v. Beckwith, 100 U. S. 514, 527; the Stephen Morgan, 94 U. S. 599; Chittenden v. Brewster, 2 Wall. 191, 196; Field v. Barber Asphalt Paving Co., 194 U. S. 618, 621. We assume this rule to be correct. Although her counsel attempted to argue the validity of the trust as a whole, and other questions, we assume without deciding, the decree to be unimpeachable and right except so far as appealed from."

Accordingly it is eminently clear that the jurisdiction of neither this Court nor the Court of Appeals has been invoked with regard to the judgment rendered in petitioners' favor, and said judgment is therefore final and cannot be attacked or disturbed.

It is respectfully submitted, that it is clear that there are no grounds for the granting of a writ of certiorari in the instant case, and that it is further clear that the appli-

cation for the writ was made merely to delay the execution of the judgment by the respondent. Therefore, it is respectfully urged that this Court adjudge reasonable damages to the respondent pursuant to subdivisions "2" and "4" of Section 56 of the Rules of this Court.

## CONCLUSION

**For the reasons set forth in the respondent's original brief, and in this reply brief, it is respectfully submitted that the petition for a writ of certiorari herein should be denied.**

Respectfully submitted,

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